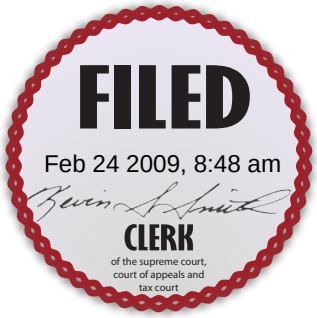

ATTORNEYS FOR APPELLANT:

RICHARD R. FOX
STEVEN A. GUSTAFSON
New Albany, Indiana

ATTORNEYS FOR APPELLEE:

DONALD S. SMITH
CHERYL D. FINCHUM
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTAL CHANDLER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-0806-EX-549
	)	
HARDIGG INDUSTRIES,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
The Honorable Linda Peterson Hamilton, Chairman
Application No. C-150985

FEBRUARY 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Christal Chandler appeals the award of the Worker's Compensation Board ("Board").

We affirm.

ISSUES

Chandler presents four issues for our review, which we consolidate and restate as:

I. Whether the Board erred by finding that Defendant-Appellee Hardigg Industries provided proper notice to Chandler under Ind. Code § 22-3-3-7.

II. Whether the Board's Findings of Fact and Conclusions of Law are erroneous.

III. Whether the Board erred by not adopting the finding of the Social Security Administration that Chandler is permanently and totally disabled.

FACTS AND PROCEDURAL HISTORY

The facts of this case are largely stipulated by the parties. Chandler began working for Hardigg Industries on September 15, 1989. On February 5, 1999, Chandler sustained an injury to her lower back while in the course of her employment with Hardigg. On February 8, 1999, Chandler sought treatment for her back from her family physician, Dr. Yepuri. He prescribed certain medications to Chandler, and she attempted to return to work. Upon returning to work, Chandler continued to complain of back pain and informed her supervisor that she may have injured her back at work on February 5, 1999. Chandler was sent to PromptMed, an occupational health service, for evaluation

and x-rays, which were negative. Although Chandler was released to work after being seen at PromptMed, she returned later in the day with complaints of back pain. Chandler was seen again at PromptMed for back pain on February 23, 1999 and on March 5, 1999, at which time she reported that her pain had not diminished. At that time, Chandler was referred for physical therapy. Chandler attended physical therapy through March 22, 1999, with no appreciable improvement in her symptoms, and was released to light duty work on March 9, 1999. Chandler presented for work on March 10, 1999, but only worked half of the day.

On March 25, 1999, Dr. Chambers, an orthopedic surgeon, diagnosed Chandler with chronic lumbar strain and recommended aggressive physical therapy and anti-inflammatory medication. Dr. Chambers noted that Chandler was not motivated in her recovery and that she was apathetic regarding physical therapy. Chandler followed a physical therapy plan at Indiana Rehabilitation Associates from March 26, 1999 through June 15, 1999. On April 19, 1999, Chandler underwent an MRI, ordered by Dr. Chambers, which identified no acute injury.

Upon Chandler's completion of physical therapy, an FCE (Functional Capacity Evaluation) was done on June 15, 1999. The FCE indicated that Chandler was able to work at the "No classification physical demand level" for an eight hour day. The evaluator noted that Chandler's scores on a portion of the FCE suggested very poor effort on her part that was not necessarily related to pain, impairment, or disability. On June 21, 1999, Dr. Chambers determined Chandler was at maximum medical improvement

and released her to work. On July 2, 1999, Dr. Chambers assigned Chandler a 0% PPI (permanent partial impairment) rating and released her to full activity as tolerated.

Later, on August 13, 1999, Dr. Holt, a spine surgeon, evaluated Chandler and indicated that she had low back pain without demonstrable cause. He ordered a discogram, which was positive at L3-4 with concordant pain at L5-S1. In December 1999, Dr. Holt recommended a brace and epidural steroid injections.

On December 7, 1999, Dr. Auerbach performed a board-appointed independent medical examination of Chandler. Dr. Auerbach diagnosed Chandler with degenerative changes in her lower lumbar area and recommended weight loss and intensive exercise. With regard to whether Chandler's symptoms were related to her work injury, Dr. Auerbach stated that the injury could have happened as Chandler described but, for someone like Chandler who has done heavy work all her life, it seemed to be a relatively minor incident.

In April 2000, Dr. Yepuri completed a residual functional capacity report. This report indicated that Chandler was able to drive for up to two hours, sit for up to two hours, stand for less than one hour and walk for less than one hour during an eight hour work day. Dr. Yepuri concluded that Chandler was unable to do most activities for more than one hour and would not be able to do various tasks for a total of eight hours.

In June 2000, Chandler was seen by Dr. Williams at the Back Clinic of Southern Indiana. At that time, Chandler complained that she was hardly able to get out of bed and that she was experiencing pain in her lower back extending into the left leg with

occasional numbness and tingling. Dr. Williams diagnosed Chandler with lumbosacral strain with resultant chronic back pain, possible degenerative joint disease and probable myofascial syndrome. Chandler underwent physical therapy at the Back Clinic of Southern Indiana from July 21, 2000 through September 12, 2000.

Dr. Ball, a psychologist, performed a social security disability evaluation on Chandler on February 21, 2001. Dr. Ball noted Chandler's history of depression, including a suicide attempt when Chandler was in her twenties and post-partum depression following the birth of her second child. Dr. Ball diagnosed Chandler with major depressive disorder, recurrent, moderate without full interepisode recovery. Dr. Ball also reported that Chandler appeared to experience depression which is exacerbated by her work-related injury. Chandler applied for disability, but, in April 2001, the Social Security Administration denied her benefits.

In June 2001, Chandler underwent an evaluation with Dr. Stewart. He assigned Chandler an 8% whole person impairment rating and added an additional 3% for pain for an 11% whole person impairment rating. Dr. Stewart later indicated his belief that Chandler was totally disabled. Later that year, in November 2001, Sally Moore performed a vocational assessment of Chandler. She stated that Chandler had reached her maximum vocational potential as a factory worker and concluded that Chandler was permanently and totally disabled and unable to return to competitive employment.

Chandler underwent another independent medical examination with Dr. Duerden on February 28, 2003. Dr. Duerden determined that Chandler's condition had reached

maximum medical improvement and that she had sustained 0% permanent partial impairment. Dr. Duerden noted in his report that Chandler's pain symptoms were of a chronic pain syndrome that needed to be addressed with psychological intervention.

Chandler later re-applied for disability. This time the Social Security Administration determined that, prior to December 1, 2004, Chandler was able to perform simple, unskilled light work with a sit/stand option. However, commencing December 1, 2004, the Social Security Administration found Chandler to be disabled due to her deteriorating mental health and due to the fact that she was unable to perform even simple, unskilled work activity.

In July 2005, Dr. Freudenberg diagnosed Chandler with major depression. In February 2006, Robert Tiell conducted a vocational evaluation on Chandler. Tiell determined that Chandler had sustained an occupational loss by virtue of her 1999 work-related injury and concluded that Chandler was 100% occupationally disabled and was unable to engage in and maintain competitive employment.

An additional vocational evaluation was conducted by Gail Corn in October 2006. She opined that Chandler could work in a sedentary to light duty capacity. However, Corn indicated that she believed it would be unlikely that Chandler would find employment without mental health treatment. In April 2007, Dr. Edelson performed a mental health evaluation of Chandler. Dr. Edelson concluded that Chandler suffered from depression and assigned her a 10% PPI rating.

On June 13, 2007, a hearing was held on Chandler's claim before a Single Hearing Member of the Worker's Compensation Board. On September 18, 2007, the Single Hearing Member issued her findings of fact and conclusions of law, including the parties' detailed stipulated facts. The Single Hearing Member determined that Chandler was entitled to temporary total disability (TTD) from June 21, 1999 through August 10, 1999 in the amount of $2,165.13.[1] Additionally, the Single Hearing Member determined that Chandler was entitled to a 10% whole body PPI award in the amount of $9,000. Chandler applied for review by the Full Board.

On March 4, 2008, the full Worker's Compensation Board heard Chandler's claim. In its decision of April 24, 2008, the Full Board adopted the decision of the Single Hearing Member and further determined that although Chandler testified that she did not receive a State Form 38911 from Hardigg on or about August 10, 1999, her claim was not credible and Hardigg had satisfied its duty pursuant to Ind. Code § 22-3-3-7. Chandler is now appealing the decision of the Full Board.

DISCUSSION AND DECISION

Upon review of a decision of the full Worker's Compensation Board, we are bound by the factual determinations of the Board and may consider only errors in the Board's conclusions. *Gonzalez v. Wal-Mart Associates, Inc.*, 881 N.E.2d 19, 23 (Ind. Ct. App. 2008). We will not disturb the Board's factual determinations unless the evidence is undisputed and leads inescapably to a contrary result. *Christopher R. Brown, D.D.S., Inc.*

[1] Hardigg paid Chandler temporary total disability benefits from February 10, 1999 through June 20, 1999 in the amount of $5,568.96.

v. Decatur County Memorial Hospital, 892 N.E.2d 642, 646 (Ind. 2008). Accordingly, on review of the Board's findings of fact, we must disregard all evidence unfavorable to the decision and may consider only the evidence and reasonable inferences drawn therefrom that support the Board's findings. *Inland Steel Co. v. Pavlinac*, 865 N.E.2d 690, 697 (Ind. Ct. App. 2007). While we are not bound by the Board's legal conclusions, we will disturb the Board's conclusions only if it incorrectly interpreted the Worker's Compensation Act. *Id.*

It is the claimant's burden to prove a right to compensation under the Worker's Compensation Act. *Danielson v. Pratt Industries, Inc.*, 846 N.E.2d 244, 247 (Ind. Ct. App. 2006). When reviewing a decision made by the Board, we neither reweigh the evidence nor assess the credibility of the witnesses. *Colburn v. Kessler's Team Sports*, 850 N.E.2d 1001, 1005 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied*, 869 N.E.2d 451.

I. STATE FORM 38911

Chandler first challenges the finding of the Single Hearing Member that she is entitled to TTD compensation from June 21, 1999 through August 10, 1999 because Hardigg did not send a Report of Claim Status (State Form 38911) until August 10, 1999. The Full Board adopted the Single Hearing Member's finding and made an additional finding with regard to this issue. The Full Board found that, although Chandler testified that she did not receive a State Form 38911 from the Defendant on or about August 10, 1999, her claim is not credible and Hardigg satisfied its duty to notify under Ind. Code

22-3-3-7. Chandler contests this finding by the Full Board and contends that she never received a Report of Claim Status from Hardigg and, therefore, she is still entitled to temporary total disability benefits.

Ind. Code § 22-3-3-7 governs the payment of TTD benefits, and it provides, in pertinent part:

> (c) Once begun, temporary total disability benefits may not be terminated by the employer unless:
>
> (1) the employee has returned to any employment;
> (2) the employee has died;
> (3) the employee has refused to undergo a medical examination under section 6 of this chapter or has refused to accept suitable employment under section 11 of this chapter;
> (4) the employee has received five hundred (500) weeks of temporary total disability benefits or has been paid the maximum compensation allowed under section 22 of this chapter; or
> (5) the employee is unable or unavailable to work for reasons unrelated to the compensable injury.
>
> *In all other cases the employer must notify the employee in writing of the employer's intent to terminate the payment of temporary total disability benefits and of the availability of employment, if any, on a form approved by the board.* If the employee disagrees with the proposed termination, the employee must give written notice of disagreement to the board and the employer within seven (7) days after receipt of the notice of intent to terminate benefits. If the board and employer do not receive a notice of disagreement under this section, the employee's temporary total disability benefits shall be terminated. Upon receipt of the notice of disagreement, the board shall immediately contact the parties, which may be by telephone or other means, and attempt to resolve the disagreement. If the board is unable to resolve the disagreement within ten (10) days of receipt of the notice of disagreement, the board shall immediately arrange for an evaluation of the employee by an independent medical examiner. The independent medical examiner shall be selected by mutual agreement of the parties or, if the parties are unable to agree, appointed by the board under IC 22-3-4-11. If the independent medical examiner determines that the

> employee is no longer temporarily disabled or is still temporarily disabled but can return to employment that the employer has made available to the employee, or if the employee fails or refuses to appear for examination by the independent medical examiner, temporary total disability benefits may be terminated. If either party disagrees with the opinion of the independent medical examiner, the party shall apply to the board for a hearing under IC 22-3-4-5.

(Emphasis supplied). The form referred to in the italicized portion of the statute is State Form 38911. It is this notice or "Report of Claim Status" that Chandler claims she never received before being terminated from Hardigg on July 15, 1999.

At the hearing on June 13, 2007, the parties filed lengthy and detailed stipulations of fact for consideration by the Single Hearing Member. Stipulation #3f states: "A form 38911 was sent to [Chandler] on August 10, 1999 indicating [Chandler's] refusal to accept light duty employment." Appellant's Appendix at 18. It is this stipulation, verbatim, that the Single Hearing Member adopted and incorporated into her findings. *See* Appellant's App. at 6, ¶6.

A "stipulation" refers to "[a] voluntary agreement between opposing parties concerning some relevant point." BLACK'S LAW DICTIONARY 1146 (Abridged 7th ed. 2000). Further, a stipulation is a confessor pleading that negates the need to offer evidence to prove the fact, and a party is not permitted to later attempt to disprove the fact. *Woods v. Woods*, 788 N.E.2d 897, 901 (Ind. Ct. App. 2003). In other words, "[a] stipulation of facts is an express waiver by a party or his counsel of the intended issues." *Id*. Accordingly, in the present case, Stipulation #3f is an agreement between Chandler and Hardigg concerning the fact that form 38911 was sent to Chandler on August 10,

1999. Based upon the parties' stipulation, the Single Hearing Member and the Board were not able to consider any evidence provided to controvert this fact because Chandler, by her stipulation, removed consideration of that issue from the case.

We note that, other than requiring the notice to be in writing on an approved form, the statute does not require any specific proof of mailing, such as certified or registered mail, for the employer's notice of its intent to terminate an employee's TTD benefits. *See* Ind. Code § 22-3-3-7(c). It seems that the burden of the employer is merely to show that notice was sent, and the employee's TTD benefits can be terminated as of that date. *See Cavazos v. Midwest General Metals Corp.*, 783 N.E.2d 1233, 1242-43 (Ind. Ct. App. 2003) (determining that, pursuant to Ind. Code § 22-3-3-7, employer could not terminate employee's TTD benefits until date that form was sent to employee notifying him of termination of benefits because of medical noncompliance).

We further note Chandler's claim that Hardigg failed to submit a copy of the Form 38911 that it sent to her. At the hearing on June 13, 2007, the Single Hearing Member gave Hardigg seven days in which to supplement the record with a copy of the Form 38911 that it sent to Chandler on August 10, 1999. Hardigg submitted a copy as requested by the Single Hearing Member via e-mail during the seven day time frame. The affidavit of Mary Taivalkoski, Executive Secretary of the Worker's Compensation Board, states that the Board's file in the present case contains a State Form 38911, signed and dated by a Hardigg representative on August 10, 1999. Thus, the Board did not err in

finding that Hardigg provided proper notice to Chandler pursuant to Ind. Code § 22-3-3-7.

II. BOARD'S AWARD

Chandler disputes two of the Board's Findings. We will address each finding in turn. First, Chandler contends that Finding of Fact and Conclusion of Law #7 leads to a conclusion of permanent and total disability. The Full Board concurred with and adopted the Single Hearing Member's finding, which states: "Plaintiff's current disability is due to her declining mental health. Her work injury did not cause her mental health issues although it did aggravate them. This aggravation resulted in a 10% whole person impairment rating per the report of Dr. Richard Edelson." Finding of Fact and Conclusion of Law #7, Appellant's App. at 13. Chandler argues that this finding that her work injury aggravated her mental health issues requires the conclusion, and commensurate award, that she is permanently and totally disabled.

In arriving at its conclusion, the Board presumably reviewed the parties' lengthy and detailed stipulated facts that it adopted as part of its decision. Included in these stipulated facts are opinions of several doctors that treated Chandler. In February 2001, Dr. Ball, a psychologist, evaluated Chandler. He documented Chandler's history of depression, including her prior attempt of suicide. Dr. Ball diagnosed Chandler with major depressive disorder, recurrent, and indicated that Chandler's depression was exacerbated by her work injury. In 2006, Gail Corn, who performed a vocational evaluation of Chandler, indicated that, due to the decline in Chandler's mental capacity, it

would be unlikely that she would find employment without mental health treatment. In April 2007, Dr. Edelson conducted a mental health evaluation of Chandler and concluded that she suffered depression based on the nature of her work-related injury. Dr. Edelson further indicated that Chandler's emotional status would improve with psychological treatment. He assigned a 10% PPI rating to Chandler as a result of her mental health.

We will not disturb the Board's findings unless the evidence is undisputed and leads inescapably to a result contrary to the Board's. Based upon the facts before the Board, we conclude that the Board's finding that Chandler's work injury did not cause, but merely aggravated, her mental health issues is supported by the evidence. Further, the reports of Dr. Edelson and Gail Corn indicate that this is not a permanent condition for Chandler; rather, with treatment Chandler is expected to improve. Thus, the Board properly ordered a 10% PPI award to Chandler for the aggravation of her mental health issues and did not err by failing to find that Chandler is permanently and totally disabled.

The second finding with which Chandler takes issue is Finding of Fact and Conclusion of Law #3. It states: "[Chandler's] work related injury resolved and she was at maximum medical improvement on June 21, 1999." Finding of Fact and Conclusion of Law #3, Appellant's App. at 13. Chandler asserts that this finding is contrary to the evidence.

The evidence presented to the Board shows that in March 1999, Dr. Chambers diagnosed Chandler with chronic lumbar strain and recommended aggressive physical therapy. At that time, he remarked that Chandler was not motivated in her recovery and

was "very apathetic regarding physical therapy." Appellant's App. at 87. In April 1999, Dr. Chambers ordered an MRI of Chandler's back which indicated no acute injury. It merely showed degenerative changes consistent with Chandler's age. During a functional capacity evaluation ("FCE") in June 1999, the evaluator noted that Chandler exhibited exaggerated symptoms and very poor effort. On June 21, 1999, Dr. Chambers placed Chandler at maximum medical improvement and released her to work. Dr. Chambers, on July 2, 1999, additionally assigned Chandler a PPI rating of 0% and released her to full activity. The following month, Dr. Holt examined Chandler and found she had low back pain with no demonstrable cause. In addition, x-rays taken of Chandler's lumbar spine in November 1999 were negative. In February 2003, following numerous attempts at other treatment, Chandler was again determined to have reached maximum medical improvement with 0% PPI as concluded by Dr. Duerden.

None of the treatment to which Chandler submitted after her release by Dr. Chambers in June 1999 improved her subjective pain complaints. Simply because Chandler sought treatment for several years following her release by Dr. Chambers does not negate Dr. Chambers' finding that she had reached maximum medical improvement in June 1999. Moreover, almost four years after Dr. Chambers released Chandler with a maximum medical improvement designation and a 0% PPI rating, Dr. Duerden also determined that Chandler had achieved maximum medical improvement and assigned her a 0% PPI rating. Thus, there is ample evidence to support the Board's finding that Chandler reached maximum medical improvement on June 21, 1999.

III. ADOPTION OF SSA FINDING

Finally, Chandler asserts that the Board erred by not adopting the finding of the Social Security Administration ("SSA") that she is permanently and totally disabled.

Under the Worker's Compensation Act, permanent total disability (PTD) benefits are awarded pursuant to Ind. Code § 22-3-3-8 when it is established that the employee will *never* again be able to work in a reasonable employment. *Bowles v. Griffin Industries*, 798 N.E.2d 908, 910 (Ind. Ct. App. 2003), *on subsequent appeal*, *Bowles v. Second Injury Fund*, 827 N.E.2d 142 (Ind. Ct. App. 2005), *trans. denied*, 841 N.E.2d 181. SSA benefits, on the other hand, are awarded pursuant to a finding that a person is unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 20 CFR §404.1505. Moreover, SSA determinations of disability are not binding upon the Worker's Compensation Board regarding its determinations of disability.

Not only are the two types of benefits based upon different definitions of disability, but also they may be based upon differing injury sources. Specifically, worker's compensation benefits are paid only to employees with disabilities arising out of an employment injury. *See Roberts v. ACandS, Inc.*, 873 N.E.2d 1055, 1062 (Ind. Ct. App. 2007) (explaining that the worker's compensation act requires employers to compensate employees for injuries that occur within the course and scope of

employment). In contrast, SSA benefits are not limited to those with a disability caused by a work-related injury. *See* 20 CFR §404.1505.

Therefore, SSA determinations are non-binding, if even relevant, with regard to disability determinations of the Worker's Compensation Board. Consequently, the Board did not err by not adopting the SSA determination of Chandler's disability.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the Board did not err in finding that Hardigg provided proper notice to Chandler pursuant to Ind. Code § 22-3-3-7. In addition, there is ample evidence to support the Board's findings that Chandler's work injury aggravated, but did not cause, her mental health issues and that Chandler reached maximum medical improvement on June 21, 1999. Finally, the Board did not err by not adopting the SSA determination of Chandler's disability.

Affirmed.

MAY, J., and BROWN, J., concur.